BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RONALD LEE CONNER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,007,224
DEVLIN PARTNERS, LLC	)	
Respondent	)	
AND	)	
	)	
FIDELITY & GUARANTY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the December 16, 2004 Order entered by Administrative Law Judge Steven J. Howard. After reviewing the briefs and arguments submitted by the parties, the Board placed this appeal on its summary docket for disposition without oral argument.

ISSUES

Claimant initiated this request for a post-award order requiring respondent and its insurance carrier to pay for a visco-elastic foam mattress that had been prescribed by a physician. In the December 16, 2004 Order, Judge Howard granted claimant's request and ordered respondent and its insurance carrier to provide the mattress at a cost of $1,978.73.

Respondent and its insurance carrier contend Judge Howard erred. They argue a mattress is neither medical treatment nor a medical apparatus and, therefore, the Judge erred by ordering them to purchase the mattress in question. Consequently, respondent and its insurance carrier request the Board to reverse the December 16, 2004 Order.

Conversely, claimant contends the Order should be affirmed. In addition, claimant also requests the Board to award him reasonable attorney fees for presenting this post-award application. Claimant argues K.S.A. 2002 Supp. 44-510h, which requires an employer and its insurance carrier to provide an injured worker with treatment reasonably necessary to cure or relieve the effects of an injury, should be broadly construed. Accordingly, claimant argues the visco-elastic foam mattress prescribed by claimant's orthopedic surgeon, Dr. William O. Reed, Jr., should be considered in this instance either

medical treatment or a medical device that is both reasonable and necessary to relieve the effects of claimant's injury.

The only issues before the Board on this appeal are:

1. Is the mattress prescribed by claimant's surgeon a medical device or apparatus or part of claimant's medical treatment that is reasonable and necessary in curing or relieving claimant's back injury?

2. Is claimant entitled to attorney fees in this post-award application?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes the December 16, 2004 Order should be affirmed.

Workers who are injured in accidents arising out of and in the course of their employment are entitled to receive benefits under the Kansas Workers Compensation Act, including such medical treatment that may be reasonably necessary to cure and relieve the workers from the effects of their injuries. K.S.A. 2002 Supp. 44-510h(a) provides:

> It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation . . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

And the injured workers' rights to receive medical benefits continue after an award for compensation has been entered. The post-award medical statute, K.S.A. 2002 Supp. 44-510k, provides, in part:

> (a) At any time after the entry of an award for compensation, the employee may make application for a hearing . . . for the furnishing of medical treatment. . . . The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. . . .
>
> (c) The administrative law judge may award attorney fees and costs on the claimant's behalf consistent with subsection (g) of K.S.A. 44-536 and amendments thereto. As used in this subsection, "costs" include, but are not limited to, witness fees, mileage allowances, any costs associated with reproduction of documents that become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs.

In addition, the Kansas Administrative Regulations also address medical treatment under the Workers Compensation Act. According to K.A.R. 51-9-2, "apparatus" as used in K.S.A. 44-510 (which was the predecessor to K.S.A. 2002 Supp. 44-510h) "shall mean such appliances as glasses, teeth, or artificial member."

And K.A.R. 51-9-7 provides that fees for "medical, surgical, hospital, dental, and nursing services, medical equipment, medical supplies, prescriptions, medical records, and medical testimony" shall be the lesser of the usual and customary charge of the health care provider or the amount allowed by the Division of Workers Compensation medical fee schedule.

Respondent and its insurance carrier do not challenge that claimant has ongoing back symptoms from the accident he sustained while working for respondent. They also do not challenge that those ongoing back symptoms precipitated the prescription by Dr. William O. Reed, Jr., for the visco-elastic foam mattress in question. But they do challenge that a mattress may be considered to be medical treatment or a medical apparatus as contemplated by the Workers Compensation Act.

Claimant did not testify at the post-award hearing before Judge Howard. Claimant, however, did introduce a medical report purportedly from Dr. Reed that indicated claimant has a herniated lumbar disc with severe symptoms. The doctor's letter, which is dated November 8, 2004, explains the mattress he is prescribing "is medically necessary for treatment of [claimant's] condition."[1] In short, the doctor concluded the mattress "will help [claimant] achieve proper spinal positioning and is necessary for [his] recovery."[2] Dr. Reed's opinions are uncontradicted.

> Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded . . . unless it is shown to be untrustworthy; and such uncontradicted evidence should ordinarily be regarded as conclusive.[3]

The Board concludes medical treatment as contemplated by K.S.A. 2002 Supp. 44-510h and K.S.A. 2002 Supp. 44-510k includes devices and equipment that aid in curing an injury or relieving the symptoms stemming from that injury. Consequently, the narrow definition of apparatus as set forth in K.A.R. 51-9-2 is not applicable to these facts. In addition, the Board rejects respondent and its insurance carrier's argument that items that possess non-medical uses should not qualify as a medical benefit under the Workers

---

[1] P.A.H. Trans., Cl. Ex. 1.

[2] *Id.*

[3] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 380, 573 P.2d 1036 (1978).

Compensation Act. The test is not whether an item may be used by others for non-medical purposes but, instead, whether the item is intended to cure or relieve the effects of a worker's injury. And that is to be determined on a case-by-case basis by examining, among other things, the manner the prescribed item is to be used and its intended benefit.

The Board is persuaded by Dr. Reed's letter that the mattress in question is reasonable and necessary as part of claimant's medical treatment. Dr. Reed believes the mattress will not only help relieve claimant's symptoms but also promote the healing process. Accordingly, the Judge did not err in requiring respondent and its insurance carrier to pay the costs of the prescribed mattress. And the Board finds no compelling reason to reverse that order.

Claimant has not presented the request for attorney fees to the Judge. Accordingly, the Board will not review that request in this appeal.[4]

WHEREFORE, the Board affirms the December 16, 2004 Order entered by Judge Howard.

IT IS SO ORDERED.

Dated this ____ day of March 2005.

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

While I must concur with the legal analysis and ultimate decision set forth above, I nonetheless believe that there is merit to the argument expressed by the dissenting members. Dr. Reed's uncontroverted medical recommendation merely parrots the marketing literature. He does not offer any real independent medical justification for why

[4] See K.S.A. 44-555c(a), which states that Board review "shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge."

this mattress, rather than any other, would "cure and relieve" claimant of the ongoing effects of the injury. It would seem that the sales propaganda is the only justification for the mattress at issue. Although the law compels this result, I believe it is unjust in this factual circumstance.

BOARD MEMBER

DISSENT

We respectfully dissent from the majority decision finding the specific mattress prescribed by claimant's physician was reasonable and necessary medical treatment. We agree with the majority that whether an item is reasonable medical treatment is to be determined on a case-by-case basis. And under appropriate circumstances, depending upon the medical condition of the injured worker, a hospital bed with mattress or only a mattress could be considered appropriate medical treatment or medical apparatus. As an example, a variable pressure mattress to prevent bedsores.

In the vast majority of cases, the fact that a doctor has prescribed treatment is substantial competent evidence that such treatment is reasonable and necessary. And there are utilization and peer review procedures to determine whether the treatment provided was justified.[5] Accordingly, we are hesitant to question the uncontradicted prescription evidence that the mattress is reasonable and necessary treatment because that is the doctor's area of expertise. And, as noted, there are other specific statutory procedures available to determine whether such treatment was reasonable and justified.

Nonetheless, the mere fact that a doctor prescribes any apparatus is not absolutely controlling whether it is medical treatment.[6] Moreover, while the trier of fact cannot arbitrarily or capriciously refuse to consider the testimony of any witness, it is not obliged to accept and give effect to any evidence which in its honest opinion is unreliable, even if such evidence is uncontradicted.[7]

In this case there is nothing particularly unique to distinguish the specified mattress from any other mattress. Nor to explain the benefit of the specifically prescribed mattress

[5] See K.S.A. 44-510j.

[6] *Hedrick v. U.S.D. No. 259*, 23 Kan. App. 2d 783, 935 P.2d 1083 (1997).

[7] *Collins v. Merrick*, 202 Kan. 276, 448 P.2d 1 (1968).

other than the fact that it appears, to these triers of fact, that advertising sales hyperbole for the mattress was not only accepted at face value by the doctor but also recited as fact that the specific mattress would provide an amazingly wide variety of listed benefits.[8] This seems more an advertisement or product endorsement than a medical prescription.

While the claimed advantages for this specific mattress are impressive, nonetheless, they appear to these triers of fact to be more borrowed from advertising sales brochures than based upon scientific fact or study. Based upon the record compiled to date, we would find the claimant failed to meet his burden of proof that purchase of this specific mattress from the stated specific retail store is reasonably necessary to cure and relieve him from the effects of his injury.

BOARD MEMBER

BOARD MEMBER

c: Daniel L. Smith, Attorney for Claimant
Michael T. Halloran, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[8] P.A.H. Trans., Cl. Ex. 1.